No. 80-5

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RICHARD JOHN McCARTY,
Appellant,

v.

PATRICIA ANN McCARTY,
Appellee.

On Appeal from the
Court of Appeal of California
First Appellate District

BRIEF AMICI CURIAE ON BEHALF OF CERTAIN MEMBERS OF CONGRESS AND ORGANIZATIONS (In Support of Appellee)

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BRIEF AMICI CURIAE ON BEHALF OF CERTAIN MEMBERS OF CONGRESS AND ORGANIZATIONS

STATEMENT OF INTEREST OF AMICI CURIAE

This brief amici curiae is filed with the written consent of counsel for the parties by eight members of Congress[1] and five organizations

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[1] The eight members of Congress are the Honorable John L. Burton, Millicent Fenwick, Margaret M. Heckler, Barbara A. Mikulski, Patricia Schroeder, John F. Seiberling, Olympia Snowe and Howard Wolpe.

composed of spouses and former spouses of military and foreign service personnel.[2]

The eight members of Congress believe that the decision in this case will significantly affect the extent to which state and local governments will remain free to exercise the authority that has traditionally been theirs with respect to family law issues. It will also have important consequences for large numbers of the constituents whom they represent.

The five organizations are made up of people who could be directly affected in a very adverse way should it become established that military pensions are not subject to division by

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[2] The five organizations are Action for Former Military Wives, Ex-Military Wives Alliance of Unrecognized Women Veterans, National Military Wives Association, Ex-Partners of Servicemen for Equality, and Association of American Foreign Service Women.

the states upon dissolution of a marriage under principles of community property law or equity.

STATEMENT OF FACTS

The relevant facts can be quickly summarized. The appellee, Patricia Ann McCarty, was married to the appellant, Richard John McCarty on March 23, 1957. In the second year of their marriage, Mr. McCarty went on active duty with the Army as a physician. Appellant continued to serve with the Army through December 1, 1976, when he petitioned for divorce in the appropriate California Superior Court. At that time he had served 220 months of the 240 months required for eligibility for Army retired pay.

Appellant's petition for divorce was subsequently granted. The Superior Court ordered appellant to

pay alimony for support, divided the available cash and the value of two vehicles between the spouses, and determined that appellant's retirement pay should be divided as quasi-community property pursuant to Section 4803 of the California Civil Code. After that decision was reached, appellant retired from the Army and began receiving retired pay in the amount of $1,500 a month.

Appellant appealed the portion of the Superior Court's decision that required the division of his Army retired pay. The Court of Appeal affirmed the lower court's decision, distinquishing this Court's intervening decision in Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), and the California Supreme Court declined to grant a hearing.

SUMMARY OF ARGUMENT

I.

This case touches on two areas traditionally reserved for the states -- family law and property law. There must be a clear statement from Congress before an intent to preempt state law in those domains will be found. In past cases before this Court, such strong language was present. The language of the statute here, supported by other indications of its meaning, compels a contrary result. The relevant provision, 37 U.S.C. § 701(a), does not on its face forbid anything but instead authorizes Army and Air Force officers to assign or transfer current pay. Even if a negative inference is supplied, the clause only reaches to voluntary assignment of future pay. And in other federal pay statutes, Congress has used language that undoubtedly does cover involuntary

assignments, which is what is involved here.

Military pensions may in part be compensation for current services. But no superior federal policy prevents California from treating them totally as pensions for state law purposes. Appellant's contentions that a ruling for Mrs. McCarty would entitle her to pension benefits beyond her husband's death or in the future give spouses of servicemen a right to enjoin retirement from the military are simply not so.

II.

Because of the traditional roles of women in our society as child-rearers and homemakers, women are often unable to remain in the work force long enough to earn their own retirement benefits. As a consequence, many elderly women without husbands live on poverty

level incomes. This plight is even more egregious for former wives of servicemen, whose chances of earning a pension while married are frustrated by their constant relocation, the customary duties of a military wife, and the long absences from home of their husbands. The Government has a strong interest in providing financially for the elderly, and in the case of a military wife whose marriage is dissolved, that policy calls for allowing the states to divide military pensions upon divorce.

ARGUMENT

I. NOTHING IN THE FEDERAL STATUTES PROVIDING FOR MILITARY RETIREMENT PAY CALLS FOR OVERRIDING STATE RULES GOVERNING THE DIVISION OF PROPERTY ON DIVORCE

A. No Subjects of Legal Rules Are More Traditionally Reserved for the Exercise of State and Not Federal Sovereignty Than Property and Domestic Relations

The legal rules governing people's most intimate relationships with

one another -- domestic relations law -- and people's relationships to land, things and money -- property law -- are unquestionably matters primarily of state and not of federal concern. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." In re Burrus, 136 U.S. 586, 593-94 (1890). "[T]he power to make rules to establish, protect, and strengthen family life . . . is committed by the Constitution of the United States . . . to the legislature of [each] State." Labine v. Vincent, 401 U.S. 532, 538 (1971). No less is property law the primary concern of the states and not the national government. Family property law, in particular, is of a "peculiarly local jurisdiction" of the states and implicates "intensely

local interests." United States v. Yazell, 382 U.S. 341, 349, 353 (1966). This is in keeping with the states' "long-established role . . . in creating property interests," Aquilino v. United States, 363 U.S. 509, 513 n.3 (1960), as well as with their responsibility for the laws governing family life. For so dominant is the state role in property law that, after title to property has passed from the United States to a private party, "that property, like all other property in the State, is subject to State legislation." Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 517 (1839).

What has just been said is not debatable. Appellant does not attempt to controvert it. The primacy of the states is asserted -- not denied -- in those few cases in which this Court has found that Congress has

ordained that federal law shall supersede some aspect of state property or domestic relations law. In Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979), the one opinion in over 440 volumes of the United States Reports that gives even plausibility to appellant's contention that state law has been displaced here, the Court was emphatic on the point:

> "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted. Wetmore v. Markoe, 196 U.S. 68, 77 (1904). A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden. United States v. Yazell, 382 U.S. 341, 352 (1966)." Id. at 581.

We now describe the compelling reasons that the Court found for the

limited incursions into state areas of responsibility that Hisquierdo and the handful of remotely similar cases allowed. Then we demonstrate that no such reasons are present in this case.

B. When Congress Means To Intrude on State "Family and Family-Property Law" To Preserve Federal Interests, It Says So Unmistakably

The Hisquierdo case concerned the division, upon divorce, of retirement benefits that the husband in the divorce action expected to receive under the Railroad Retirement Act. The Court held that under that statute the wife could not be awarded a share of her husband's benefits as community property. The reason was -- principally -- the unequivocal language of Section 14 of the Railroad Retirement Act of 1974, which carried forward what was said in Section 12 of the Act of 1937.

> "Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . . ." 45 U.S.C. § 231m.

The legislative history confirmed that the purpose of the clause was "to make it sure that the annuitant gets the pension." 439 U.S. at 576 n.7. The Court also noted that Congress had provided in the Act benefits for the spouse of a railroad worker, which "even embodied a community concept to an extent," but that these benefits ceased upon divorce, demonstrating that Congress meant that community to terminate at that point. Id. at 584-85. Section 14, its history and the other manifestations of Congressional purpose disposed of the wife's principal claim, which was to periodic payments

of a part of what the husband would receive under the Railroad Retirement Act.

The Court also rejected an alternative claim. This was for an offsetting award of community property that was available at the time of the divorce, as compensation for the wife's interest in her husband's pension. Again, Section 14 foreclosed that claim. The Court held that the compensatory offset scheme conflicted with the clause of Section 14 that states flatly that the payment of an annuity shall not "be anticipated." 439 U.S. at 588-90.

The Court in Hisquierdo adverted to "four prior occasions" on which it had "found it necessary to forestall . . . [major damage] to federal rights by state law based on community property concepts." Id. at

582. On each such occasion Congress or its delegate had spoken in terms that admitted of as little doubt as the terms of Section 14 of the Railroad Retirement Act.

In McCune v. Essig, 199 U.S. 382 (1905), the Court rejected an attempt by Mary McCune to establish an undivided one-half interest in a parcel of land. Her parents had settled the land as homesteaders. Under the Federal Homestead Act, a patent to land would not issue until certain conditions were met. McCune's father died, and his widow exercised her right under the Act to fulfill the requirements for a patent. Appellant claimed that a half interest had passed to her at her father's death, under the community property laws of Washington. The Homestead Act, however, clearly gave the widow a right to

continue cultivation and ultimately to obtain a fee title by patent. The Court was left in no doubt. "It requires an exercise of ingenuity to establish uncertainty in [the Homestead Act] provisions." Id. at 389.

In Wissner v. Wissner, 338 U.S. 655 (1950), appellant's estranged husband had bought a National Service Life Insurance policy and named his parents as beneficiaries. Appellant asserted her right to one-half of the insurance proceeds under California community property law. This Court held that California law had been preempted by clear Congressional enactments. The controlling section provided that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance [within a designated class] . . . and shall . . . at all times have the

right to change the beneficiary or beneficiaries." Id. at 658 (citations omitted). Moreover, the diversion of future payments to Wissner's widow would have necessitated seizure by legal process. This would have been in "flat conflict" with the provision of the federal insurance statute that "[p]ayments to the named beneficiary 'shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.'" Id. at 659.

In Free v. Bland, 369 U.S. 663 (1962), petitioner Free claimed sole title to a United States savings bond registered to "Mr. or Mrs. Free." His wife had recently died, and her son from a previous marriage asserted an interest in the bonds by virtue of

Texas community property laws. A Treasury regulation, issued pursuant to undoubted Congressional authority and designed to carry out the Congressional purpose of making savings bonds attractive to potential buyers, id. at 669, made the survivor of two co-owners of an "or" form bond "'the sole and absolute owner.'" Id. at 667 n.5. Another provision of the regulation stated that "'[n]o judicial determination will be recognized which would . . . defeat or impair the rights of survivorship conferred by [the] regulations.'" Id. at 667 (citations omitted). The Court recognized that "[t]he clear purpose of the regulations is to confer the right of survivorship on the surviving co-owner." Id. at 668. See also Yiatchos v. Yiatchos, 376 U.S. 306 (1964) (Treasury regulations making the beneficiary of bonds payable

on death the sole and absolute owner preempt state community property law).

C. In Statutory Provisions Dealing with Army Officers' Retirement Pay, Congress Expressed no Intent To Override State Law Governing the Disposition of Property upon Dissolution of a Marriage

The statutory provisions dealing with Army officers' retirement pay stand in stark contrast to the statutes and regulations discussed above.

Appellant discourses learnedly and at length on the statutes that govern Army retirement pay. When all is said and done, however, there is only one section of the United States Code that is even arguably pertinent to his preemption claim. That is 37 U.S.C. § 701(a). It is pertinent, if at all, only by implication. In terms it is an authorization to Army and Air

Force officers to assign their pay checks (including retirement paychecks) as they come to hand.

> "Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, a commissioned officer of the Army or the Air Force may transfer or assign his pay account, when due and payable."[3]

The implication may be that the officer may not "transfer or assign his pay account" in advance. Such an implied restriction falls markedly short of the catalogue of means of ensuring that the annuitant gets his pension that were held in Hisquierdo to preclude the application of state community property law. If an officer may not assign future pay, it does not follow that, as Section 14 of the Railroad

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[3] Section 1-17 of Army Regulation No. 37-104-1 implements this section for retired pay. It provides that "[a] retired officer may transfer or assign retired pay when due and payable."

Retirement Act has it, no other federal law and no state law may result in tax or garnishment or attachment "or other legal process under any circumstances whatsoever" and that the payment of an annuity shall not "be anticipated."

The negative implication of Section 701(a), at that, is a dubious one. If Section 701(a) implicitly forbids Army and Air Force officers to "assign" their future pay, Section 701(d) turns right around and allows them to make "allotments" from their future pay "for the support of . . . relatives, or for any other purpose that the Secretary . . . [of the Army or Air Force] consider proper." Allotments, then, are permitted by statute for wives, children and other relatives and, by regulation, for purposes such as buying savings bonds and paying insurance premiums. 32

C.F.R. §§ 59.1-59.4. "Allotment" is not defined in the Code, but even if it is thought to embody the idea of revocability, as "assignment" presumably does not, it is certainly a kind of "transfer." Section 701(a) authorizes transfers as well as assignments of pay when due and payable, and appellant, in terming the statute an anti-assignment statute (Appellant's Br. 17), must logically be urging that the statute is an anti-transfer statute also, implicitly forbidding transfers of future pay.

Appellant, having assumed without analysis the negative implication of the authorizing language of Section 701(a), goes so far as to say that the phrase "'[w]hen due and payable' is simply an alternative phrasing for the prohibition against 'anticipation' considered in Hisquierdo." (Appellant's

Br. 27.) Not so. The Court in Hisquierdo looked to the law of trusts for enlightenment on what a prohibition against anticipation entails and found that, according to Dean Griswold's classic treatise on spendthrift trusts, such a prohibition is commonly understood to mean that "the interest of a sole beneficiary shall not be paid to him before a certain date," Griswold, Spendthrift Trusts § 512, p. 583 (2d ed. 1947), quoted at 439 U.S. at 588. Thus, in the Hisquierdo case, the offsetting immediate award that the wife sought as an alternative to periodic payments would have improperly anticipated payment by allowing her "to receive her interest before the date Congress has set for any interest to accrue." Id. at 589. If Army and Air Force officers are forbidden, analogously to Dean Griswold's sole

beneficiary of a trust, to receive advances against their pay -- to "anticipate" their pay -- it is not by virtue of Section 701(a) (or any other statute appellant has cited).

It is, however, instructive here also to look to the law of trusts for enlightenment on the character of the restriction that Section 701(a), read most generously for appellant, implies. There are two categories of state trust statutes dealing with the assignability of the beneficiary's interest in a trust. The statutes have been collected by Professor Scott in his treatise. 2 Scott, Trusts § 152.1 (3d ed. 1967 & Supp. 1979).

One group of statutes limits the voluntary assignment of a beneficiary's interest and is worded as a restriction on the beneficiary. The other group restricts involuntary

assignments and is phrased in terms of the extent to which the interest in the trust can be reached by creditors and courts. Section 701(a), if relevant at all, is within the first group. It prohibits, if anything, only voluntary assignments by the officer. Involuntary assignments by way of legal process are left untouched. And it was to the prohibition of involuntary assignments by way of legal process that the Court was referring when it said that Section 14 of the Railroad Retirement Act "plays a most important role in the statutory scheme." 439 U.S. at 583-84. Its role is that of an "anti-attachment provision[s]," ensuring "that the benefits actually reach the beneficiary." Id. at 584. Statutory provisions that merely forbid voluntary assignments necessarily play a lesser role.

That Section 701(a) reaches only voluntary assignments of future pay, if any, means that it contrasts not only with Section 14 of the Railroad Retirement Act but also with other federal pension plan provisions. Involuntary assignments are precluded in no uncertain terms in these statutes as well. The law governing federal civil service pensions generally forbids assignment, in law or equity, and immunizes the pension from "execution, levy, attachment, or other legal process." 5 U.S.C. § 8346. The statutes governing Foreign Service pensions and veterans' benefits contain comparable language. See 22 U.S.C. § 1104 (Foreign Service); 38 U.S.C. § 3101 (veterans' benefits). Even more strikingly, as appellant himself points out, Congress has adopted "a strong anti-assignment provision for

the Survivor Benefit Plan, 10 U.S.C. § 1440." (Appellant's Br. 30.) The survivor benefit plan is an annuity plan for the survivors of servicemen financed out of deductions from retirement pay. (See Appellant's Br. 21.) The anti-attachment provision (a more apt characterization than appellant's) of the governing statute reads, "No annuity payable under this subchapter is assignable or subject to execution, levy, attachment, garnishment, or other legal process."

As long ago as 1792 the Congress knew how to write a strong anti-assignment, or anti-attachment, clause. The very same day that the original version of Section 701 was passed, applicable only to enlisted men, Act of May 8, 1792, ch. 37, § 4, 1 Stat. 279, the Second Congress made the arms and ammunition that a militiaman was required to

keep "exempted from all suits, distresses, executions or sales, for debt or for the payment of taxes." Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271-72.

Appellant ascribes significance to the fact that the Foreign Service and Civil Service pension systems have lately been amended to make pensions subject to division as part of a divorce decree. Foreign Service Act of 1980, Pub. L. No. 96-465, § 820(b)(1), 94 Stat. 2120 (to be codified as 22 U.S.C. § 4060); 5 U.S.C. § 8345(j)(1). (Appellant's Br. 24-25.) A similar amendment to the military retired pay provisions was considered but not enacted in the 96th Congress. H.R. 2817, 96th Cong., 1st Sess. (1979); H.R. 3677, 96th Cong., 1st Sess. (1979); H.R. 6270, 96th Cong., 2d Sess. (1980). Amendment of the Foreign Service and Civil Service

pension laws was necessary because of the anti-attachment provisions of those statutes. A mere clarification of the military pension scheme, which included no anti-attachment provision, was by no means so urgent.[4] In any

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[4] Appellant quotes a statement by one of these amici, Representative Schroeder, the sponsor of H.R. 2817, as evidence that existing law does not entitle an ex-spouse to a share of a serviceman's pension. (Appellant's Br. 25, n.35.) (The full statement is attached as an Appendix.) The bill would have entitled a former spouse to a pro rata share of a serviceman's pension, provided that the couple was married at least two years. It was in this context that Rep. Schroeder said that "[u]nder current law a divorced spouse is prohibited from receipt of retirement . . . benefits," Appendix at 1, to indicate that existing law does not give the former spouse any pro rata share. Rep. Schroeder stated later on that the reason legislation was needed was to "clear up the confusion in the courts about Congressional intent regarding pensions." Appendix at 8. These statements are not probative of the meaning of § 701(a). "The interpretation placed upon an existing statute by a subsequent group of Congressmen

(Footnote Continued)

event, the subsequent inconclusive Congressional consideration is not a ground for ascribing one meaning or another to the existing statute. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304, 313 (1960).

The short of it is that the crystal-clear language of the statutes involved in Hisquierdo and the precedent cases, which this Court has rightly required as a prerequisite to a decision

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(footnote cont'd)

who are promoting legislation and who are unsuccessful has no persuasive significance [in the courts]." United States v. Wise, 370 U.S. 405, 411 (1962). These amici claim no special authority for the construction of federal statutes urged in this brief merely by virtue of the fact that Representative Schroeder and other members of Congress are among the amici.

that Congress meant to intervene in traditionally local affairs, is lacking from the military pay statutes. Even the much stronger clause in the Employee Retirement Income Security Act of 1974, which requires private pension plans to proscribe the assignment or alienation of benefits, 29 U.S.C. § 1056(a)(1), has been held insufficient to preempt state community property law. In re Marriage of Campa, 89 Cal. App.3d 113, 152 Cal. Rptr. 362 (1979). This Court only last term dismissed an appeal in that case for want of a substantial federal question. 444 U.S. 1028 (1980). Moreover, the intent to cut off the marital community, which this Court inferred in Hisquierdo from the termination of a spouse's annuity upon divorce, 439 U.S. at 584-85, is absent here. And the anti-anticipation clause, which prevented an award of

offsetting community property in Hisquierdo, is absent as well.

D. No Discernible Congressional Policy Is Frustrated by Treating an Army Pension or Pension Expectancy as Community Property

The policy that underlies Section 701(a) is a familiar one. Section 701(a) is no more than the codification of a very old principle: the law will not permit an assignment of a public officer's salary. See generally 6 Am. Jur. 2d Assignments § 52 (1963); 6A C.J.S. Assignments § 26 (1975); 70 C.J.S. Pensions § 9 (1951); 1 Scott, Trusts § 79 (3d ed. 1967). That rule is meant primarily to protect the public. An employee who has already frittered away his future salary may not put forth his best efforts on the job. There may also be a desire to protect the public

servant against his own folly. See 4 Corbin, Contracts § 857 (1951).

In the case of Army and Air Force officers, the anti-assignment policy, if it exists, cannot be a very strong one. There is no statute prohibiting their fellow officers in the Navy and Marine Corps from assigning their pay. There was no such prohibition implied by statute even for Army officers until 1907. The original anti-assignment statute applied only to privates and non-commissioned officers. Now Section 701(c), that provision dates back to 1792. Act of May 8, 1792, ch. 37, § 4, 1 Stat. 279, 280. There is no illuminating legislative history.[5] A statute governing the assignment of pay by

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[5] As originally presented to the House in February 1792, the bill to which the anti-assignment provision was added made no mention of assignments of pay. 1 American State Papers 46 (Misc. 1834).

commissioned officers was first enacted in 1907. Act of March 2, 1907, ch. 2511, 34 Stat. 1158, 1159. Previously commissioned officers were covered only by Army regulations. See Act of April 23, 1904, ch. 1485, 33 Stat. 259, 266. There is surely no basis here for inferring the sweeping preemptive effect for which appellant contends.

This is aside from the fact that we deal here with retired pay, with respect to which the need to protect the public against the improvidence of its servant is minimal.

It has been argued that a decision in favor of appellee would unjustly reduce retirement benefits of the bachelor sailor who has too much to drink one evening and wakes up the next morning only to find that he got married the night before. While such stories may be the grist of Hollywood

script writers, we suspect that the incidence of such events in real life is so slight that the argument can fairly be disregarded.

It has also been argued that recruiting of military personnel would be hindered by a decision upholding California pension splitting. A report by The President's Commission on Military Compensation, however, disagrees:

> "The retirement plan apparently has little influence on prospective recruits or on service members in their first enlistment. This phenomenon results from the strong preference among young people for current income rather than deferred income. For such persons, up front compensation in the form of pay or bonuses can be a much more effective incentive than retirement . . . ." Report of the President's Commission on Military Compensation, p. 27, April 1979.

E. The Fact That for Some Purposes Military Retirement Pay Is Regarded as Pay and not a Pension Does Not Prevent Its Being Treated as Community Property

Appellant argues that, because Army retired pay "is continuation of active duty pay -- in the nature of reduced pay for reduced services" (Appellant's Br. 38), it cannot be treated by a state as what appellant terms "divisible property."

The conclusion does not follow from the premise. There is no question of the continuing obligations of the retired Army officer that appellant describes. Nor can one doubt the authority he cites for the proposition that retired pay is, for some purposes, different from a pension. Yet, it is hard to imagine that Colonel McCarty, just like the California courts (Appellant's Br. 37 n. 59), has

not in unguarded moments referred to his Army pension. Of course, the compensation he is now receiving is in the nature of a pension -- as well as in the nature of reduced pay for reduced services. For most retired officers, the services are reduced to nothing. California was entitled to look to the realities and not to form. The realities are that the expectancy of retired pay came into being during the existence of the marital community. The officer was married when he performed the services that entitled him to retire with continued compensation. Thus, it is appropriate to treat the expectancy, as the California courts have, as an asset of the marital community. No federal statute defining the nature of retired pay forbids such treatment. As we have seen, Congress last year acted to allow the division

of Foreign Service retirement pay (p. 27, supra); like military officers, retired Foreign Service officers are -- by the same amendatory statute -- liable to recall for active service. Foreign Service Act of 1980, supra, § 308, 94 Stat. 2086 (to be codified as 22 U.S.C. § 3948).

In none of the other respects suggested by appellant does the California treatment of retired pay impinge upon any defined federal interests.

Appellant suggests that the "implication" of the California decision to apply community property principles to military retired pay is that the divorced wife -- assuming that the member of the service is the husband -- has an "entitlement" to retired pay for as long as she lives, irrespective of whether her spouse predeceases her. (Appellant's Br. 32.) There is

of course no substance to this suggestion. No person can claim any greater "entitlement" to retired pay than federal law itself permits. Under federal law, the duration of military pay is limited to the lifetime of the person who earned it; when that person dies, the benefit ceases to exist. That fact of life has already been recognized by the California courts themselves. See, e.g., Fithian v. Fithian, 10 Cal.3d 592, 599, 517 P.2d 449, 111 Cal. Rptr. 369 (1974), cert. denied, 419 U.S. 825 (1974).

Appellant's conjecture that a serviceman's ex-spouse might attempt to control the serviceman's decision whether to remain in the military is similarly misguided. Appellant's Br. 32-33. The California Supreme Court has already specifically stated that it does not believe that its community

property treatment of retired pay in any way limits "the employee's freedom to change or terminate his employment, to agree to a modification of the terms of his employment (including retirement benefits) or to elect between alternative retirement programs." In re Marriage of Brown, 15 Cal.3d 838, 849, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). Under California law, "[t]he employee retains the right to decide, and by his decision to define, the nature of the retirement benefits owned by the community." 15 Cal.3d at 850. In short, there is simply no basis for appellant's suggestion that the California courts might attempt to "intervene . . . in the operation of the personnel system of the Army" by attempting, on behalf of an ex-spouse, to control the decision of the former spouse with respect to continued military tenure. Appellant's Br. 33.

II. THE NATIONAL POLICY THAT FAVORS PROVISION FOR THE FINANCIAL NEEDS OF THE ELDERLY WOULD BE SUBVERTED BY A DECISION THAT CALIFORNIA LAW HAS BEEN PREEMPTED

There is an undoubted national policy that favors caring for the financial needs of people in their later years. The expressions of the policy are too many and too familiar to bear citation. The provision of military retired pay is itself one such expression and -- for the military wife whose marriage lasts until the the husband dies -- the military survivor benefit plan to which we have referred is another. But, unless the states are left free, as a decision against preemption in this case would leave them free, to divide military retired pay on dissolution of a marriage, the national policy will not be well served in the case of the military

spouse whose marriage fails. The case in which the Court is asked to decide against preemption comes from a community property state, but the impact of a decision against preemption would not be limited to the community property states. States other than the community property states make equitable distributions of marital property upon divorce, distributions that are comparable to treatment of the property as that of the marital community. See, e.g., Chisnell v. Chisnell, 82 Mich. App. 699, 267 N.W.2d 155 (1978), cert. denied, 442 U.S. 940 (1979); Kruger v. Kruger, 139 N.J. Super. 413, 354 A. 2d 340 (1976); In re Marriage of Musser, 70 Ill. App.3d 706, 388 N.E. 2d 1289 (1979). Those states would be as free as California to give effect to national policy in their divorce decrees.

To provide financially for military spouses whose marriages fail is particularly urgent because (1) most of them are women, who as a group are less likely to enjoy appreciable pension payments than men, and (2) the military life imposes extraordinary limits upon the ability of the military wife to earn a pension of her own.

In 1978 only 29 percent of women aged 55 or older, and only 9 percent of women aged 65 or older, who maintained families without a husband were employed. The median income for these women between the ages of 55 and 64 was $4,533. For women from the group who were 65 and older, it was $3,087.[6] In 1976, 72 percent of

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[6] Department of Commerce, Bureau of the Census, Social and Economic Characteristics of the Older Population: 1978, p. 20.

unmarried elderly women had incomes below the poverty line.[7]

With most elderly women unemployed and living on near-poverty-level incomes, the need for a pension during old age is acute. Yet the barriers to earning entitlement to a pension in private employment are such that even most women in the work force reach retirement age without pension rights of their own.

Employed women are less likely than men to be covered by private pension plans, because -- for the most part -- they work in poorer industries where fringe benefits such as pensions do not exist. In addition, women are less likely than men to be union members and therefore less

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[7] President's Commission on Pension Policy, An Interim Report, p. 28, May 1980.

likely to benefit from pensions provided under collective bargaining agreements. Since women are paid about 59 percent of what men earn, even for the woman who does earn a pension, the pension benefits are likely to be smaller.[*]

The right to earn a pension is often foreclosed to women because they interrupt their work to bear and rear children. Although women between the ages of 20 and 24 have the highest labor force participation rate (68.3 percent in 1978), by age 25 many women drop out for child rearing. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1000 et seq., which governs private pensions,

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[*] Benson, Women and Private Pension Plans, presented to the U.S. Dept. of Labor Advisory Council on Employee Welfare and Pension Benefit Plans, p. 3, November 1980.

permits an employer to require an employee to work 10 years before becoming entitled to a pension.[9] This is a distinct hardship for women, who are likely to hold their jobs for shorter periods than men.[10] For example, a woman who works from age 18 until age 25 and then drops out to have a child may not be entitled to a pension at all because she has not worked 10 years. Furthermore, ERISA permits private pension plans to require an employee to work at least 1,000 hours in a year before

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[9] 29 U.S.C. § 1053.

[10] Department of Labor, Bureau of Labor Statistics, News Release USDL 79-285, April 23, 1979; Congressional Research Service of the Library of Congress for the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging, Women and Retirement Income Program: Current Issues of Equity and Adequacy, Committee Pub. No. 96-190, 96th Cong., 1st Sess. (1979).

entering a plan.[11] Women are far more likely than men to work fewer than 1,000 hours.[12]

The obstacles to earning a pension in the private sector are particularly high for wives of servicemen. The life of a military wife is different from that of her civilian counterpart. Military people have to move frequently, sometimes overseas or to parts of this country where jobs for women are not easy to find. Appearing before the Citizens Conference on Pension Policy on September 5, 1980, a representative of an organization of former military wives testified that 15 moves in a 30-year career was not unusual.[13] Among 211

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[11] See 29 U.S.C. § 1052.

[12] Benson, supra, p. 44.

[13] Testimony of Winnifred Cowan on behalf of Ex-Partners of Servicemen for Equality to the Citizens Conference on Pension Policy, September 5, 1980.

members of the organization surveyed, the average length of the wife's marriage was 22 1/2 years. During the marriage, an average of 12 moves were made.[14]

Frequent moves prevent a military wife from accumulating an employment tenure that would entitle her to earn her own retirement benefit. And private employers are wary of hiring a military wife because her husband will inevitably be reassigned to another duty station. Even when military wives are able to obtain a job, they earn less than their civilian counterparts. Department of Defense, Report of the Pay Adequacy Study, October, 1979.

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[14] Testimony of Winnifred Cowan on behalf of Ex-Partners of Servicemen for Equality before the House Armed Services Subcommittee on Military Compensation, May 28, 1980.

Traditions and customs within the military community have also discouraged military wives from working. Officers' wives, such as appellee, are less likely to work (16.2 percent) than enlisted men's wives (31.6 percent). This is of course partly because officers are paid more, "but also because the role of the officer's wife is subject to more specific normative regulation. Officers' wives are generally dissuaded from outside employment, but no such norm affects the wife of an enlisted man." Little, Occupational Socialization 253.

Testimony by the former wife of a general before the House Armed Services Subcommittee on Military Compensation on May 28, 1980, illustrates the point. She testified that she was always expected to nurture her husband's

career from the sidelines by attending wives' club functions, entertaining, doing volunteer work, and attending command functions.[15] In addition to these responsibilities, long absences of the military man from his home and family require the presence of the wife in the home, further preventing her from engaging in outside employment. "The average Navy career involves at least 7 out of 20 years spent away from home, in extreme cases, many more. The Navy spouse, left with children to care for and with a household to manage, must act for months at a time as independently as a single parent." Dingle Associates, Inc., The Navy Leaders' Family Manual prepared for Department of the Navy, p. 3, 1980.

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[15] Id.

Wives of commanding officers have special duties. A publication entitled Guidelines for the Wives of Commanding and Executive Officers, compiled by the Protocol Committee of the Navy Wife Line Association (1977), states that

> "this is her time to make a visible and necessary contribution both to the Navy and to the country. She has a very important part to play in (her husband's) success as a commanding officer. During her husband's command, she is a person set apart. She has heightened responsibility to her husband and his career." (p. 1)

An independent career for a commanding officer's wife is not encouraged because she is expected to have a great deal to do at home. In fact the Guidelines urge the commanding officer's wife to

> "put in extension phones with extra long cords (or remote phone jacks) in all major work areas, i.e., laundry room, kitchen, den, and bedroom. Always take calls in an area where there is work to be

> done. It can be amazing how much laundry can be done, how much baking, dinner preparation, or just plain cleaning can be done on the end of a 13-foot cord. The cost of the long cords and extensions will more than pay for themselves if they enable keeping up with domestic duties -- even if a significant time is spent on the phone." (p. 11).

The nature of the military compensation system aggravates the hardship for the former military spouse who is not awarded a portion of her former husband's retirement benefit. Traditionally, military compensation differs from civilian compensation in that current pay is relatively low, but pension benefits are relatively large. For example, the lifetime value of the typical United States military retirement pension for an officer with 20 years of service who retires at age 43 is $420,000. For an officer with 30 years of service who retires at age 53, the pension is

worth $590,000. Report of the President's Commission on Military Compensation, p. 31, April, 1978.

Because of the low current pay and expectation of a generous retirement benefit, most servicemen do not accumulate assets other than the retirement benefit. This lack of savings and investment is encouraged because the government provides housing to over one-third of all eligible personnel. Little, Occupational Socialization 258. The frequent changes in duty assignments and relocation of residence force most servicemen to rent rather than buy their homes. Conseqently, equity build-up that civilian homeowners enjoy exists far less among military couples.

The nomadic lifestyle of the military family and the lack of current asset accumulation breed a strong

dependence on military benefits for the serviceman's wife and family. The Library of Congress reported to the House of Representatives Select Committee on Aging that, upon divorce, spouses

> "do not retain any entitlement to nonmonetary benefits due to spouses of military retirees, such as medical care, exchange and commissary privileges, and use of certain military base privileges. It has been argued by many observers that the abrupt cut-off of compensation and benefits to the divorced spouse of a military retiree is grossly inequitable. These persons cite the sacrifices made by military wives during the course of the military career with attendant moves (which interfere with the wife's ability to establish her own career), long intervals of managing a household during a husband's absence, and arduous, irregular, and long working hours and conditions."[16]

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[16] Congressional Research Service of the Library of Congress for the Subcommittee on Retirement Income and Employment of the Select Committee on Aging, House of Representatives, Women and Retirement Income Programs: Current Issues of Equity and Adequacy, Comm. Pub. No. 96-190, 96th Cong., 1st Sess. (1979).

Another study of Navy wives by Dr. Sabra Wolley-Downs of the Family Services Section of the Bureau of Navy Personnel found that, within a group of older women surveyed, most wanted their husbands to finish 20 years in the Navy, since at that point the servicemen would become entitled to retirement benefits.

The plight of the ex-military wife has recently come under scrutiny by the Government's policymakers. Their unanimous conclusion is that retirement benefits should be apportioned between both spouses upon the dissolution of the marriage.

In August of 1980 the President's Commission on Pension Policy noted that "there has been explicit recognition of the earnings sharing approach to earned pension benefits in recent divorce settlements, particularly

in community property states." Working Papers: Working Women and Retirement, p. 41, August 1980. In the Commission's Interim Report in May of 1980 the Commission stated that it

> "believes that employee pensions should be taken into account when people divorce, and survivor protection should be automatic for married and divorced spouses. For divorced spouses, the survivor protection should be prorated based on years of pension service accrued during the marriage." (p. 32).

The Commission's draft of its final Staff Recommendations on the subject of pension and divorce states that "it is the intent of the Commission to encourage state divorce courts and attorneys handling marital dissolutions to consider earned pension benefits as divisible marital property." (Section V) Underlying the Commission's staff recommendation of pension splitting is its belief . . . "that a nonemployed

spouse whose share of marital community property has centered around home and children should not be left without pension income as a consequence of the divorce; particularly where pension benefits have been accrued during the marriage and credited to the employee's spouse." (Section I).

In summary, the national policy clearly favors the right of a former military wife to a proportionate amount of her former husband's military retirement benefits. Thereby the military wife whose marriage fails, who was prevented from earning her own pension while contributing to her husband's military career, will have a measure of financial protection in her old age.

CONCLUSION

Amici believe it important that the judgment below be affirmed for the reasons stated herein.

Respectfully submitted,

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TESTIMONY BEFORE THE
HOUSE ARMED SERVICES
SUBCOMMITTEE ON
MILITARY COMPENSATION

By Rep. Patricia Schroeder (D-Colo)

May 28, 1980

Thank you very much for the opportunity to testify before this Subcommittee on the plight of military former spouses, and in particular on my bill, H.R. 2817.

I applaud this Subcommittee for holding hearings on this matter. The issue raised is one for which serious consideration is long overdue.

When a military man divorces his wife, the wife not only loses a husband but also her claim to his military retirement pay and survivors' benefits. Under current law a divorced spouse is prohibited from receipt of retirement or survivors' benefits even when a marriage lasted 20 or 30 years.

The result: displaced military homemakers who have no claim to the retirement income that they have helped to earn.

The military former spouses' situation has been aggravated by recent social changes. First, the divorce rate has doubled in the last 10 years with the rate for long term marriages ending in divorce increasing substantially. Second, all but three states have moved to some form of no-fault divorce since 1974, with limited, if any, spousal support or alimony provided. Third, alimony is no substitute for a vested property right, since alimony ceases with the death of the wage earner.

Last May, I introduced H.R. 2817, the Military Retirement Income Equity Act to remedy the inequities military former spouses face. The

bill entitles a former spouse to a pro rata share of their spouse's retirement pay if the couple were married at least 10 years, awards a pro rata share of survivors' benefits to a divorced spouse, and makes survivors' benefits mandatory unless the employee and his spouse and or former spouse (if any) choose to waive the receipt of survivors' benefits.

H.R. 2817 is based on the premise that, among other things, marriage is an economic partnership and that a spouse makes a significant contribution to the military employee's ability to go through the ranks successfully, and consequently receive a pension.

This concept was recently acknowledged by the President's Commission on Pension Policy. In its interim report it recommended that pensions be

defined as a property right and that divorced spouses be entitled to a prorated portion of the benefits earned by their spouses during the marriage.

A couple marries and establishes a household, often deciding that the husband, who's in the Armed Forces will supply the family income and the wife will work in the home without wages and care for their children. They have established their economic partnership. It seems fair enough. Then, 20 or 30 years down the road, the couple decides to divorce, and suddenly the marital balance is tipped. The military retiree walks away from the divorce with a full retirement plan and the spouse, after putting in just as many years in the home as her husband devoted to the military, walks away with nothing.

We are a society which places value on home and family, encouraging women to stay at home and take care of their children. Yet, one of the most severe forms of economic discrimination is that we fail to attach an economic value to this service.

We give wonderful lip service to the reverence of the role of the woman in the home. The plight of the displaced military homemaker is an example of how in the home, a woman's role as housewife and mother receives reverence and honor -- but no monetary value. Unfortunately, the honor a woman gets for staying at home and raising children won't buy groceries, pay medical bills or send the kids to college.

Military wives know lots about honor. They have put up with

many difficult conditions for the good of their country. These spouses have traditionally contributed to the undertakings of the military, sharing the hardships of living abroad, with limited opportunity to maintain separate careers. They have been subject to the frequent uprooting that accompanies changes of duty station, irregular hours, and long periods of separation peculiar to military life. As THE AIR FORCE WIFE, a book by Nancy Shea published in 1951 stated, "...every Air Force Wife has 3 basic responsibilities: (1) to make a congenial home, (2) to rear a family of which he will be proud, and (3) to strengthen her husband's morale". Indeed, the armed forces have given retirement certificates to the wives acknowledging their years of service along with their husband's.

The legislation would award a pro rata share of the retirement benefits to a divorced spouse, male or female, married for at least 10 years. The exact amount of the former spouse annuity would depend upon the number of years of marriage that overlap with the credited years of service toward retirement. At a maximum, the former spouse annuity would amount to 50 percent of the retirement benefits, if married during the entire period of creditable work years.

Furthermore, the former spouse would be entitled to a pro rata share of the survivors' benefits, which would amount to the maximum 55 percent of the lifetime annuity if married during the entire period of creditable service. A surviving spouse would be entitled to benefits based on the number of years of marriage

during creditable service, as well as the remainder of the survivorship benefit not claimed by the first spouse, including credit for any years during which the employee was not married.

The legislation would make survivors' benefits mandatory unless the retiree, spouse, and former spouse (if any) elect out of the survivorship plan. While this step may be controversial, it appears to be necessary. First, many retirees are not fully aware of the consequences of their irrevocable decision at the time of the retirement, but when they later discover that they have made a mistake, it is loo late to rectify it. Second, widows, who discover after the death of a spouse that they have no survivors' benefits, write frantic letters to their Members of Congress, only to be

informed that under the law they are entitled to no benefits if their spouse opted out of survivors' benefits at the time of retirement.

As of September 1977, there were 1,155,000 military retirees drawing retired or retainer pay, and of that number only 55,446 provided survivors' benefits for their spouses. While more retirees have opted for survivors' benefits in recent years, the magnitude of the problem is evident when we look at the record in fiscal year 1976 when there were 64,000 military retirees, of which only 50 percent chose to participate in the survivors' benefit plan.

As a result, approximately 30,000 surviving spouses found themselves ineligible for survivors' benefits. While there is an actuarial reduction of retired pay during the retiree's

lifetime to pay for survivors' benefits, the amount of the reduction is minimal compared to the cost to the survivors of no benefits following the death of the retiree. For example, for the average enlisted man whose retirement pay equals $423 per month, the reduction for the survivors' benefit would be only $20 per month. For the average officer who receives $841 per month, the reduction would be only $62 per month.

Unlike civil service and Foreign Service members, military personnel do not pay into the military retirement system, although since 1957 members of the armed services have made mandatory contributions for social security coverage. While this gives military spouses and former spouses more protection than is available to spouses in other Federal retirement

programs, it is still not adequate protection. First, the former spouse cannot draw social security benefits, regardless of her age, until the military spouse retires and begins collecting social security benefits. Since military personnel frequently retire at an early age and begin another career at midlife, many work well beyond age 65, thus preventing a former spouse from receiving social security benefits.

Second, even if a spouse or former spouse is entitled to both social security and benefits through the survivors' benefits plan (SBP), dual benefits are not paid since the amount of social security attributable to the husband's military service is offset from the SBP payments. Third, social security was never intended to provide the sole retirement income to

a retiree or spouse, but to supplement other retirement income. In fact, those women who depend solely on social security subsist well below the poverty level of $2,900 for single older women, since the average payment for women is $2,676 annually or $223 per month.

I thought the subcommittee would find it interesting that the President's Commission on Pension Policy in its interim report recommended that survivor protection should be automatic for married and divorced spouses. To waive the benefit protection, both spouses should have to sign a waiver witnessed by the plan administrator or agent after having been informed of the provision by the administrator. For divorced spouses, the Commission recommended that the survivor protection should be prorated

based on years of pension service accrued during marriage.

The idea of a divorced spouse being entitled to her former husband's pension is nothing new. Under social security, if a wife has been married to a covered worker for at least 10 years at the time she is divorced, she will be entitled to a divorced wife's benefit or a surviving divorced wife's benefit. This is the same benefit which is provided to a wife or widow of a covered worker.

Other countries also recognize a former spouse's right to her former husband's retirement benefits. In the United Kingdom, any divorced individual is entitled to use the earnings records of the ex-spouse only for the time of the marriage in order to determine the first tier, flat benefit only. In West Germany, a 1977 law required that

the earnings credits accumulated during the marriage by either spouse are shared equally upon divorce. In 1978, Canada's social security pension system provided pension credits that were split equally in event of a divorce after at least three years of marriage. When the divorced spouse dies, the Swiss, British, and West German social security pension systems generally split the survivors' benefits between the divorced wife and the surviving wife on the basis of how long each was married.

I have also introduced legislation to amend the civil service and Foreign Service retirement systems with the same provisions set forth in H.R. 2817. The civil service bill, H.R. 2818, is still in the House Post Office and Civil Service Subcommittee on Compensation and Employee Benefits.

However, the Foreign Service bill, H.R. 2857, has been amended and included in H.R. 6790, the Foreign Service Act. The bill will go to the floor early this summer.

The Foreign Service provision as amended provided for a pro-rata division of retirement and survivor's benefits, based on the number of years of marriage, between the member of the Foreign Service and the former spouse. This pro-rata division was a presumption, subject to affirmation, modification, or vitiation by the state family law court. This bill gave the current spouse and former spouses of over ten years a right to sign off before the participant waived all survivor's benefits.

I mention this language because it may provide the route this subcommittee might want to go when

considering legislation surrounding this issue. The court order language in this provision permits the courts to vary the pro-rata share if there is overwhelming cause that it should be changed. The court would be allowed to make adjustments with the entitlement or vested interest. This provision would also permit spouses to make voluntary settlements or negotiate a settlement with the court when it would be to the former spouses' advantage to take cash or other assets in lieu of the pension benefits.

I think the pro rata presumption is important to set forth in federal legislation. Because of the variations in state domestic relations law, the pro rata presumption is needed to instruct attorneys and judges to consider the pension rights and needs of the individuals involved

in a divorce. Although precedent was set in California in a legal malpractice case which required a lawyer to pay his client $100,000 for failure to include the military pension as part of the marital property, most states do not have such incentives.

Moreover, there has been considerable confusion in the courts concerning the intent of Congress. The Supreme Court, in the Hisquierdo decision, interpreted the intent of Congress to prevent traditional community property state treatment of pensions as marital property. Therefore, it is imperative that there be a strong statement from Congress to clear up the confusion in the courts about Congressional intent regarding pensions.

I hope this subcommittee issues such a strong statement by adopting H.R. 2817. Many women are depending upon you.